

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25815
G/prt

_____AD3d_____

Submitted - September 29, 2009

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL, JJ.

2008-05254

DECISION & ORDER

Guadalupe Mejia, a/k/a Fred Mejia, et al., appellants,
v Era Realty Co., et al., respondents.

(Index No. 11112/06)

Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Stephen C. Glasser of counsel), for appellants.

Saretsky Katz Dranoff & Glass, LLP, New York, N.Y. (Robert B. Weissman of counsel), for respondents Era Realty Co., Edward Cohen, and Robert Cohen.

Jacobson & Schwartz, Rockville Centre, N.Y. (Henry J. Cernitz of counsel), for respondent Circle A Foods, Inc.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Phelan, J.), dated May 14, 2008, as granted that branch of the motion of the defendants Era Realty Co., Edward Cohen, and Robert Cohen, and that branch of the cross motion of the defendant Circle A Foods, Inc., which were for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs payable to the defendants appearing separately and filing separate briefs.

The plaintiffs' contention that the defendants should not have been awarded summary judgment dismissing the complaint insofar as asserted against them because they failed to submit evidence in admissible form in support of their respective motion and cross motion is without merit

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(see *Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008; *Felberbaum v Weinberger*, 40 AD3d 808, 809).

The plaintiffs alleged that the injured plaintiff tripped and fell over a hole in a parking lot owned by the defendants Era Realty Co., Edward Cohen, and Robert Cohen (hereinafter collectively the Era defendants), and leased to the defendant Circle A Foods, Inc. (hereinafter Circle). With respect to the Era defendants, they established their entitlement to judgment as a matter of law by demonstrating, prima facie, that they were out-of-possession landlords who had no duty to maintain the parking lot (see *Sanchez v Barnes & Noble, Inc.*, 59 AD3d 698; *Brewster v Five Towns Health Care Realty Corp.*, 59 AD3d 483; *Greco v Starbucks Coffee Co.*, 58 AD3d 681; *Robinson v M. Parisi & Son Constr. Co.*, 51 AD3d 653). In opposition, the plaintiffs failed to raise a triable issue of fact (see *Chery v Exotic Realty, Inc.*, 34 AD3d 412). With respect to Circle, in response to its demonstration of its entitlement to judgment as a matter of law, the plaintiffs failed to submit evidence sufficient to raise a triable issue of fact (see *Gordon v American Museum of Natural History*, 67 NY2d 836). The affidavit of the plaintiffs' expert was speculative and insufficient to raise a triable issue of fact as to whether Circle had constructive notice of the hole that allegedly caused the injured plaintiff to fall, or whether the parking lot was adequately lit at the time of the accident (see generally *Greco v Starbucks Coffee Co.*, 58 AD3d 681).

MASTRO, J.P., FISHER, ANGIOLILLO and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court